

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Rural Broadband Experiments)	WC Docket No. 14-259
)	

**OPPOSITION AND COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ submits these comments and opposition to various petitions submitted to the Federal Communications Commission (Commission) regarding its report and order that established procedures for the competitive bidding process to be used during the Connect America Fund (CAF) Phase II auction.² USTelecom opposes several of the proposals raised in the petitions, including those that would unnecessarily risk the Commission's limited CAF resources, or unnecessarily direct such CAF resources to areas where funding is not justified. However, USTelecom supports other targeted proposals that would enhance administration of the CAF program, and ensure that the auction achieves the Commission's universal service goals.

I. The Commission Should Reject Proposals to Automatically Qualify Provisionally Selected Bidders from the RBE Program for Participation in the CAF II Auction.

USTelecom opposes Broad Valley Micro Fiber Network's (Broad Valley) request that Rural Broadband Experiments (RBE) applicants that were provisional winners in the RBE

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets.

² Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 81 FR 44414, 31 FCC Rcd. 5949, FCC 16-64 (released May 26, 2016) (*CAF II Auction NPRM*).

program should be automatically qualified to participate in the CAF Phase II auction.³ By way of background, in administering the RBE program, the Commission required that those seeking to participate in the RBE program submit a formal application that included a proposal containing basic information that would be informative to the general public and would be released publicly.⁴ Once an entity was determined to be a provisional winner, the winning providers would be required to submit audited financial information for the most recent three consecutive years by December 19, 2014 as part of the program's post-selection review process.⁵

Broad Valley was a provisional winner and therefore up until that point had to only submit basic information to participate in the program; however after its selection Broad Valley declined to offer any financial and technical information, and thus defaulted on its bid. As such, Broad Valley and other provisional winners that defaulted on their bids had only provided minimal information that does not justify an automatic presumption of qualification to participate in the CAF Phase II auction. We do agree that arguably those provisional RBE winners that went on to receive RBE funding after meeting the FCC's financial and technical requirements have made enough of a showing that they should be qualified for the auction, but parties such as Broad Valley have not provided that sort of substantive information.

In creating the rules associated with the RBE program the Commission was acting as a steward of \$100 million in funding provided by rate-payers, and thus recognized that it must not distribute funding until it determines whether the selected applicants have "the technical and

³ See, Petition for Reconsideration *In the Matter of Connect America Fund; ETC Annual Reports and Certifications; Rural Broadband Experiments*, WC Docket Nos. 10-90, 14-58 and 14-259 at 1 (*Broad Valley Petition*).

⁴ See, Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90 and 14-58, 29 FCC Rcd 8769, 8785 at ¶ 45 (2014) (*Rural Broadband Experiments Order*).

⁵ See *Rural Broadband Experiments Order* 29 FCC Rcd 8769, 8787-88 at ¶ 54 (2014).

financial qualifications to successfully complete the proposed project within the required timeframes”⁶ and ultimately denied multiple petitions for waiver of the post-selection financial filing requirements.⁷ Similarly, with respect to the CAF Phase II auction, the Commission recognizes its obligation to ensure that those that participate are capable of providing the services for which they bid, and in the *April 2014 Connect America Order*, the Commission adopted the requirement that all participants in the Phase II competitive bidding process must certify as to their financial and technical capabilities to provide the required services within the specified timeframe in the geographic area for which they seek support.⁸

Underlying Broad Valley’s request is that they and other provisional RBE winners who have provided no financial or technical information to the FCC should be allowed to participate. This request lacks any foundation and should be rejected. Furthermore, it would reward applicants that have affirmatively demonstrated an inability to comply with FCC requirements and would unnecessarily risk the FCC’s limited CAF resources by potentially awarding them to unqualified candidates.

II. The Commission’s Decision to Exclude From Eligibility Census Blocks Where 10/1 Service has Already Been Deployed was Appropriate, and Represents a Prudent Use of Limited CAF Resources.

USTelecom also opposes the request from the National Rural Electric Cooperative Association (NRECA) and the Utilities Technology Council (UTC) (collectively the “Utility Petitioners”) that the Commission reconsider its decision to “exclude certain census blocks from being eligible for funding in the Phase II auction,” including census blocks subject to non-

⁶ See *Rural Broadband Experiments Order* 29 FCC Rcd 8769, 8787 at ¶ 52.

⁷ See Memorandum Opinion and Order on Reconsideration *In the Matter of Connect America Fund; Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259 (Aug. 19, 2016).

⁸ Report and Order et al., *Connect America Fund et al.*, WC Docket No. 10-90 et al., 29 FCC Rcd 7051, 7060-66, para. 47 (2014) (*April 2014 Connect America Order and/or FNPRM*).

winning RBE Category 1 bids where the bidder or another unsubsidized competitor went on to deploy 10/1 Mbps service.⁹ Contrary to the objections of the Utility Petitioners, the Commission’s decision represents sound public policy and reflects prudent use of limited CAF resources.

The Utility Petitioners argue that their member companies deployed broadband in such areas on the “good faith expectation that they would be able to compete in the Phase II auction for access to funding to cover the cost of their deployment.”¹⁰ Such allegations are without merit and should be rejected by the Commission.

While the Utility Petitioners assert that “[n]owhere in the *December 2014 Connect America Order* did the Commission indicate that it would exclude those census blocks from eligibility if subsequently served with 10/1 mbps service,” they ignore the fact that the Commission reached *exactly* that conclusion in 2011. In its 2011 USF/ICC Transformation Order, as the Commission considered which areas should be eligible for CAF support, it concluded “on balance, that it would be appropriate to exclude any area served by an unsubsidized competitor.”¹¹

The Commission’s 2011 USF/ICC Transformation Order appropriately concluded that “[p]roviding universal service support in areas of the country where another voice and broadband provider is offering high-quality service without government assistance is an

⁹ See, Joint Petition for Reconsideration of the National Rural Electric Cooperative Association and the Utilities Technology Council, *In the Matter of Connect America Fund; ETC Annual Reports and Certifications; Rural Broadband Experiments*, WC Docket Nos. 10-90, 14-58 and 14-259, p. 8 (*NRECA/UTC Petition*).

¹⁰ *Id.*, p. ii.

¹¹ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, 76 FR 78384, 76 FR 76623, 77 FR 26987, ¶ 170 (November 18, 2011) (*USF/ICC Transformation Order*).

inefficient use of limited universal service funds.”¹² Indeed, the USF/ICC Transformation Order contains multiple references to the fact that the CAF will not provide support in areas where unsubsidized competitors are already providing broadband.¹³ These repeated statements by the Commission – starting in 2011 – thoroughly undercut the Utility Petitioners’ arguments that the Commission’s decision “pulls the rug out from under applicants that deployed rural broadband networks based on the good faith expectation that they would be able to compete in the Phase II auction for access to funding to cover the cost of their deployment.”¹⁴ The Commission made it repeatedly clear that areas with an unsubsidized competitor would not receive CAF funding.

Given the Commission’s recurrent emphasis on this point, it is difficult to imagine how any broadband provider could develop a “good faith expectation” that their deployment costs would be covered in such instances.¹⁵ Ultimately, the Utility Petitioners’ members made deliberate and informed business decisions to deploy broadband infrastructure in the absence of *any* federal CAF support. It is simply unfathomable that the Commission would reverse years of established policy and provide limited CAF resources to entities that made informed business decisions based simply upon an unrealistic expectation of access to CAF resources.

¹² *USF/ICC Transformation Order*, ¶ 281.

¹³ *See e.g.*, *USF/ICC Transformation Order*, ¶ 24 (stating that “the CAF will not provide support in areas where unsubsidized competitors are providing broadband that meets our definition.”); *see also, Id.*, ¶ 103 (noting that “all broadband buildout obligations for fixed broadband are conditioned on *not* spending the funds to serve customers in areas already served by an “unsubsidized competitor.” (*emphasis added*); *see also, Id.*, ¶ 170 (concluding, on balance, “that it would be appropriate to exclude any area served by an unsubsidized competitor.”); *id.*, ¶ 175 (“Because we exclude from the price cap areas eligible for support all census blocks served by an unsubsidized competitor, we will generally be offering support for areas where the incumbent LEC is likely to have the only wireline facilities, and there may be few other bidders with the financial and technological capabilities to deliver scalable broadband that will meet our requirements over time.”).

¹⁴ *USF/ICC Transformation Order*, p. ii.

¹⁵ *NRECA/UTC Petition*, p. ii.

III. Absent Removal of the Requirement for Standalone Voice, the Commission Must Provide Support for Carriers Meeting that Obligation.

In its Request for Clarification,¹⁶ Southern Tier Wireless, Inc. (Southern Tier) requested that the Commission remove the requirement that CAF Phase II auction winners provide standalone voice service. As a basis for this request, Southern Tier states that its voice service will be provided using interconnected VoIP, and that, “as such, a standalone voice product does not make sense to us.”¹⁷ USTelecom agrees with Southern Tier that the Commission should either remove the requirement for standalone voice service for all CAF II recipients, or provide support for carriers meeting that obligation.

Over the years, the Commission has determined that the service supported by the federal universal service high-cost and low-income support mechanisms is voice telephony service. It also concluded that, as a condition of receiving high-cost support, an eligible telecommunications carrier (ETC) must make available voice telephony service on a standalone basis throughout its ETC service area.¹⁸ Additionally, it required all ETCs to participate in the Commission’s Lifeline program.¹⁹ ETCs designated by state commissions also may be subject to state-specific ETC requirements.

Previous Commission and state commission interpretations of section 214(e) have imposed significant costs on carriers that are ETCs, particularly price cap carriers, whose ETC service areas mirror their large study areas. According to the Commission’s current ETC requirements, a price cap carrier must offer standalone voice telephony service throughout those

¹⁶ Request for Clarification or Partial Reconsideration, Southern Tier Wireless, Inc., *In the Matter of Connect America Fund; ETC Annual Reports and Certifications; Rural Broadband Experiments*, WC Docket Nos. 10-90, 14-58 and 14-259 (July 20, 2016).

¹⁷ *Id.*, p. 4.

¹⁸ See *USF/ICC Transformation Order*, ¶ 80.

¹⁹ See 47 C.F.R. § 54.405(a).

parts of its study area not subject to the FCC’s December 2014 forbearance, including high-cost and extremely high-cost areas where the price cap carrier does not receive support. ETCs also must offer Lifeline-discounted service in such areas. Requiring ETCs to offer a service – standalone voice service – that a dwindling number of consumers purchase²⁰ causes these carriers to spend resources that are better spent furthering the Commission’s refocused universal service objectives.

Consistent with Southern Tier’s proposal, the Commission should either remove the requirement for standalone voice service for all CAF II recipients, or provide support for carriers meeting that obligation. It makes no sense to continue maintaining price cap carriers’ legacy ETC obligations, and the accompanying legacy ETC designations created almost two decades ago, that were designed for high-cost support mechanisms that soon will be phased out and implicit support schemes that competition has long since eroded. Those designations and obligations increase costs by forcing providers to design products and services to meet obsolete regulatory requirements, rather than consumer demand.

Indeed, these legacy ETC requirements not only discourage private investment needed to close the gap between served and unserved areas, they will also deter participation in CAF Phase II by service providers that are unable to economically perform legacy ETC duties in addition to the obligations associated with the new CAF Phase II support. Thus, maintaining these legacy ETC requirements on price cap carriers all but ensures that the Commission either will be unable to adequately achieve its CAF objectives or will have to devote significantly more resources to do so. By eliminating these legacy ETC requirements and designations, the

²⁰ See e.g., Declaratory Ruling, Second Report and Order, and Order on Reconsideration, *Technology Transitions, USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, FCC 16-90, ¶ 16 (July 15, 2016) (noting USTelecom’s estimate that “only 16 percent of households retained incumbent LEC switched access lines as of the end of 2015.”).

Commission will enable price cap carriers and other legacy ETCs to focus limited capital resources to extend broadband to additional areas, rather than wasting them on rapidly obsolescing facilities and services.

Absent their elimination, and consistent with the requirements of the statute, the Commission should ensure that such voice services are supported. Section 214(e)(1) of the Communications Act of 1934, as amended (Act), provides that an ETC “shall be eligible to receive universal service support in accordance with section 254,” and “shall, throughout the service area for which such designation is received . . . offer the services *that are supported by* Federal universal service support mechanisms under section 254(c).”²¹ Under the Commission’s current interpretation of that provision, a provider may be designated as an ETC and bear ETC obligations regardless of whether it *actually receives* any support from the legacy high-cost funding mechanisms on the theory that it is nonetheless “eligible” to receive such support. That approach may have been defensible under the pre-*USF/ICC Transformation Order* regime and funding mechanisms insofar as multiple carriers could be designated as ETCs in the same geographic area. But the Commission cannot reconcile this existing interpretation with the statute once the Commission implements CAF Phase II.

IV. The Commission Should Reconsider the Unlimited Usage Requirement for the Above-Baseline and Gigabit Performance Tiers.

USTelecom agrees with Verizon that the Commission should reconsider the unlimited usage requirement for the “above baseline” and “gigabit” performance tiers because it could discourage bidding on those tiers.²² Verizon correctly notes that the Commission’s decision to

²¹ 47 U.S.C. § 214(e)(1) (emphasis added).

²² Verizon Petition for Reconsideration, *In the Matter of Connect America Fund; ETC Annual Reports and Certifications; Rural Broadband Experiments*, WC Docket Nos. 10-90, 14-58 and 14-259, pp. 4 – 5 (August 8, 2016) (*Verizon Petition*).

impose this requirement runs counter to existing precedent where the Commission has previously used actual usage data to set the usage allowance for the CAF Phase II offers, the rate-of-return CAF program, and the baseline tier of the CAF auction.²³

USTelecom agrees that the Commission should instead set the usage requirement for the above-baseline and gigabit tiers in a manner consistent with the usage limits for similar urban offerings. When it adopted that approach in its 2011 USF/ICC Transformation Order, the Commission was seeking to ensure that “funding recipients offer service that is reasonably comparable to comparable services offered in urban areas.”²⁴ As Verizon correctly notes, the Commission neither explains its decision to change course and for the first time require a CAF recipient to offer unlimited usage nor does it demonstrate that unlimited usage is “reasonably comparable” to urban broadband offerings.²⁵

Absent a change by the Commission, its unlimited usage requirement will increase the cost of providing above-baseline and gigabit services in rural areas. Broadband providers seeking to deploy above baseline and gigabit networks in rural areas will be required to ‘over-engineer’ their respective networks, in order to satisfy an arbitrary – and indeed, unnecessary – usage standard. As noted by Verizon, the significant investments and operating expenses necessary to achieve such usage thresholds will only accommodate a small number of customers whose very high usage would be responsible for a disproportionate share of demand. For the foregoing reasons, the Commission should reconsider its unlimited usage requirement and set such requirements for the above baseline and gigabit tiers so that they are consistent

²³ *Verizon Petition*, p. 4.

²⁴ *USF/ICC Transformation Order*, ¶ 91.

²⁵ *Verizon Petition*, p. 4.

with the usage limits for similar urban offerings.²⁶

V. The Commission Should Modify the Location Flexibility Rules.

USTelecom also supports Verizon’s recommendation that the Commission provide greater location flexibility for CAF auction participants than for CAF model-based support recipients. As noted by Verizon, disparities in location information will have a much greater impact on CAF auction participants than on CAF model-based support recipients because of the Commission’s decision to change the way that it counts locations for the buildout obligation. Specifically, there is no built-in margin of error for the CAF Phase II auction because the Commission has set the buildout target at 100 percent of the modeled location count.²⁷

The Commission has previously acknowledged the need for location flexibility, since “there will be eligible areas in which the ‘real world’ location count is less than the modeled location count or bidders face other challenging ‘facts on the ground.’”²⁸ These location count differences, combined with the obligation of providers to build to at least 95 percent of modeled locations, will discourage parties from bidding on any area in which the actual location count is less than the modeled location count, or, bidders face other challenging facts on the ground.²⁹ As Verizon correctly notes, the “requirement that providers build to at least 95 percent of modeled locations – combined with the requirement that providers return funding (subject to the penalty factor of 1.89) even if they achieve the 95 percent threshold but fall short of 100 percent – will discourage parties from bidding on any area in which the actual location count is less than

²⁶ The Commission’s most recent urban rate survey shows many urban providers have usage limits for services of 100 Mbps or more that range from 250 gigabytes per month to 1,000 gigabytes per month (1 terabyte per month) (available at: <https://www.fcc.gov/general/urban-rate-survey-data-resources>) (visited August 31, 2016).

²⁷ *Verizon Petition*, pp. 6 – 7.

²⁸ *Id.*, p. 6.

²⁹ *Id.*

the modeled location count or bidders face other challenging ‘facts on the ground.’”³⁰

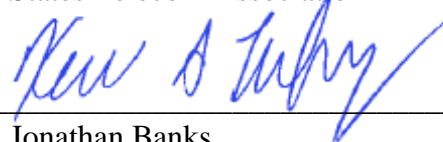
USTelecom also agrees that the Commission should reduce the minimum buildout threshold from 95 percent to a lower and more appropriate percentage of modeled locations. As Verizon notes, such an adjustment will “increase the number of areas that attract bids despite location modeling errors or other challenging conditions.”³¹

USTelecom also supports Verizon’s recommendation that the Commission eliminate its requirement that providers return funds if they meet the minimum threshold but fall short of 100 percent of modeled locations.³² Such a requirement is unnecessary for the CAF auctions, since the amount bid by the provider will already reflect the cost of building out to the minimum number of locations.³³ If the Commission does not modify its location flexibility requirements, it should expect the CAF auction bid amounts to be higher for a given area to account for the anticipated penalty and, we believe, too much of the limited funding will go towards penalties rather than building broadband.

Respectfully submitted,

United States Telecom Association

By:



Jonathan Banks
Kevin G. Rupy
B. Lynn Follansbee

607 14th Street, NW, Suite 400
Washington, D.C. 20005
(202) 326-7300

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³⁰ *Id.*

³¹ *Verizon Petition*, p. 7.

³² *Id.*, p. 7.

³³ *Id.*, pp. 6 – 7.